Report Pursuant to 83 Ill. Adm. Code 200.520
of the Commission's Rules of Practice

Docket No: 01-0707
Bench Date:8/25/04
Deadline: N/A

TO: The Commission

FROM: Claudia E. Sainsot, Administrative Law Judge

DATE: August 19, 2004

SUBJECT: Illinois Commerce Commission
On Its Own Motion

Reconciliation of revenues collected under gas adjustment charges with actual costs prudently incurred.

Petition of the Illinois Attorney General for Interlocutory Review of a Protective Order.

RECOMMENDATION: Deny the relief requested in the Petition for Interlocutory Review.

This interlocutory appeal, filed by the Illinois Attorney General on August 12, 2004, (the "AG") concerns a ruling made on July 21, 2004, entering a Protective Order. On August 18, 2004, Peoples Gas Light and Coke Co. ("Peoples") filed a Response to the AG's Petition for Interlocutory Review.

Background

At a status hearing conducted on February 10, 2004, Motions to Compel brought by Staff, CUB and the City of Chicago which sought an Order requiring Peoples to turn over certain documents evidencing its relationship, and the relationship of some of its affiliates, with Enron and Enron affiliates were denied. These motions were denied because the questions posed were very vague and overly broad. Also, none of the movants had made any contact with Counsel for Peoples (*i.e.,* a telephone call) within the past year, regarding the documents at issue, as they were required to do pursuant to our rules of practice, prior to making a motion to compel discovery. (Tr. 130-34; 83 Ill. Adm. Code 200.360).

However, this ruling permitted Staff and other parties to redraft more specific discovery requests. Newly-discovered evidence indicated that there might have been a profit-sharing agreement between Peoples affiliates and Enron, which could establish that Peoples' gas purchases from Enron might not have been prudently incurred.[1] (Tr.128-36). At that point in time, however, discovery was nearly completed and the parties only sought additional discovery regarding the relationship between Peoples Gas Light and Coke Co., as well as some of its affiliates, and Enron/Enron affiliates.

Also at the February 10, 2004 hearing, suggestions were made to the parties as to how they might proceed with discovery efficiently and quickly, such as avoiding duplicative discovery requests, moving for issuance of subpoenas, (to obtain documents from entities that are not parties to the proceeding) and use of the discovery tools in the Supreme Court Rules, which Commission Rules permit.[2] (Tr. 131-34; *See also,* Opposition of the AG, City and Cub to Peoples Motion for a Discovery Order at 8; 83 Ill. Adm. Code 200.335). These suggestions were made to avoid vague discovery requests and the unnecessary delay that vague and overly-broad discovery requests can cause. Generally, the discovery requests made pursuant to the Supreme Court Rules are more specific than what is propounded here, that is "data requests." (*See, e.g.,* S. Ct. Rules 213, 216).

Discovery is a process in which the parties share information, amongst themselves, outside the purview of the trier-of-fact, unless there is a dispute. Therefore an ALJ would not be privy to what discovery requests were propounded, or what was tendered pursuant to a discovery request, unless, a motion was filed, seeking a resolution of a dispute regarding discovery. (*See, e.g.,* S. Ct. Rule 219, requiring the involvement of a circuit court judge in certain types of discovery if there is a dispute.).

Since February 10, 2004, Peoples has tendered 43 boxes of documents to Staff, CUB, the AG and the City, as well as 135 DVD/CDs with so many gigabytes of information on them that as of July 21, 2004, Staff computers were unable to read the data. The discovery at issue here only concerns the relationship between Peoples, its affiliates, and Enron/ Enron affiliates. Obviously, if succinct discovery requests had been made, the amount of information tendered by Peoples would have been substantially less than 43 boxes of documents and 135 DVD/CDs. Also, some of the parties have asked for information that duplicates what other parties have propounded as discovery requests. (*See, e.g.,* Tr. 274 discussing that discovery requests for incentive compensation plans for all of the executives at all Peoples affiliates from 1996 through 2004 was not relevant and was overly broad; Tr. 277, discussing a duplicative discovery request and discussing why discovery requests concerning Enron's bankruptcy, which occurred after the reconciliation year, are not relevant; *See also* Peoples Response to AG Petition for Interlocutory Review at 1-2).

Originally, the parties had entered into an Agreement which provided that the parties would keep those documents confidential that Counsel for Peoples had marked

[1] Apparently, Peoples purchased a great deal of gas from Enron/Enron affiliates during the reconciliation period.
[2] These suggestions were not requirements.

"confidential." The Confidentiality Agreement provided a procedure, through which, a party could challenge this designation. This Agreement states, however, that, if there is a dispute between Peoples and a party, or Staff, regarding whether a document is truly confidential, Peoples must move for entry of a protective order. It also provides that once material is designated as confidential, it shall not lose that status, unless a party challenges such status. Therefore, pursuant to this Agreement, documents that are marked "confidential" stayed confidential and under seal at trial, unless a party challenges the documents' designation as confidential. (AG Petition for Interlocutory Review, Attachment A).

However, Counsel for Peoples had reviewed information tendered prior to the February 10, 2004 hearing, and determined that this information was proprietary or, otherwise privileged, and then designated documents as "confidential." So, the documents tendered prior to the February 10, 2004, ruling, were marked "confidential" after Counsel for Peoples made a determination that these documents were confidential. (Tr. 385). However, prior to the February 10, 2004, ruling, the discovery requests propounded on Peoples were not "expansive." (*See, e.g.,* Peoples Response to AG Motion for Interlocutory Review at 5).

After the February 10, 2004 hearing, Staff Counsel apparently advised Counsel for Peoples that Staff would not agree that tender of documents by Peoples subject to the attorney-client privilege did not constitute a waiver of Peoples' attorney-client privilege.[3] Staff Counsel further advised Counsel for Peoples, essentially, that if Peoples desired to preserve its attorney-client privilege, Counsel would have to seek a protective order. (*See,* Staff Response to PG Motion to Regulate Electronic Data, Attachments). Also, the parties had discussed entry of a protective order amongst themselves. (*See,* Tr. 237, discussion of the AG regarding what terms of a protective order the parties had discussed.).

Counsel for Peoples filed a Motion for the Entry of a Protective Order, with an attached draft protective order on July 1, 2004. The primary reasons cited by Peoples for entry of a protective order were that, in order to comply with discovery propounded on it in accordance with the discovery schedule, Peoples was required to disseminate a large amount of electronic data. Peoples represented that this electronic data contained proprietary information and material that is subject to the attorney-client privilege. Because electronic data is easily transmitted, Peoples averred that entry of a protective order was necessary to prevent improper transmission of privileged information. (*See,* Peoples' Motion for Entry of a Protective Order).

The parties were served with copies of Peoples' Motion and the attached draft of the protective order. Peoples contended that entry of a protective order was a way to tender the documents to the parties in a timely fashion, and then sort out what documents could not be published to third parties later, as the need arose. (*See, e.g.,* Tr. 264-65; 322-23; 331-32). Also, Peoples' draft protective order had a provision stating that tender of

[3] Some of the discovery requests included performing word searches of deleted and undeleted material on the computers of attorneys for Peoples, *i.e.*, the computer of Mary Klyasheff, for information related to what was negotiated on behalf of Peoples/Peoples affiliates in relation to Enron/Enron affiliates for the reconciliation period.

documents subject to the attorney-client privilege does not constitute waiver of that privilege.[4]

At the status hearing held on July 13, 2004, the attorneys for Peoples stated that they did not review all of these documents to determine what was confidential; instead, they marked all of the documents as confidential. However, Counsel also represented that not all of these documents are confidential. (Tr. 262-63).

On July 13, 2004, none of the parties had filed objections to the Peoples' Motion for Entry of a Protective Order. Protective Orders, usually, are fairly routine matters. Generally, parties do not object to entry of such orders. And, as the AG points out, the parties had already entered into a protective agreement which preserved the confidentiality of information tendered by Peoples in discovery, which is what protective orders concern.

In order to move this case along, then, revisions to Peoples' draft protective order were made and ready at the July 13, 2004, status hearing. At that hearing, however, the AG, the City, Staff and Cub objected to entry of *any* protective order, so, the parties were asked to brief their objections with regard the provisions in the revised Protective Order.

Staff, the AG, CUB and the City, took the position that Peoples must to go through all of the material in the 43 boxes and 135 DVD/CDs and sort out what was confidential information, which probably necessitates having lawyers look through of that material, at least to determine what is protected by the attorney-client privilege. (*See, e.g.,* Tr. 256). These parties presented no "middle of the road" approach on this issue. They made no suggestions as to how the documents might be tendered in accordance with the discovery schedule without having counsel look through all these documents and data and then segregate what was protected by the attorney-client privilege and what was proprietary. (*See, e.g.,* AG Opposition to Proposed Protective Order.).

It is unusual to designate documents as "confidential," and state later that not all of these documents are confidential. However, there is no indication here that this was done for any other reason than an attempt to get the information to Counsel for the AG, CUB, Staff and the City, in a timely fashion. This is also a highly unusual situation, as the AG, CUB, Staff and the City have asked for, and received, a tremendous amount of information, which should concern only a limited topic. Further, it is highly unusual to request information from an attorney's files, (*i.e.,* the word searches of attorneys' computers) as the attorney-client privilege prevents disclosure of most of this type of information. (*See, e.g., In re Marriage of Decker,* 153 Ill.2d 298, 301, 606 N.E.2d 1094 (1992), ruling that, when there an attorney-client relationship, in which, an attorney and client have communicated in a professional capacity, there is a rebuttable presumption that the communication is privileged; S. Ct. Rule 201(b)(2) and *Exline v. Exline,* 277 Ill. App. 3d 10, 13-14, 659 N.E.2d 407 (2nd Dist. 1995), establishing that matters subject to the attorney-client privilege are not discoverable.).

[4] None of the parties objected to language in Peoples' draft protective order, or, in the Protective Order that was entered, that preserved Peoples' attorney-client privilege.

Finally, it should be noted that trial in this matter is scheduled to commence on November 3, 2004. Some of the parties have indicated that they may not be ready to proceed with trial at that time. (*See,* Joint Motion to Amend the Schedule). If Counsel for Peoples were required to sift through all of the documents at issue, the trial would probably be delayed by two to three months. (Tr. 256).

The Protective Order

The Protective Order was entered after the parties were asked to, and did, file briefs on whether such an order should be entered, and, if so, what should be in that order. (*See, e.g.,* AG Opposition to the Proposed Protective Order). Many of the issues raised by the parties were incorporated into the final version of the Order. (*See,* Tr. 218-236). After it was entered, Peoples tendered the 135 CDs/DVDs of electronic information to various parties.[5] (*See,* Peoples Response at 2).

The Protective Order has a method, pursuant to which, the parties resolve, between themselves, what discovery tendered pursuant to the February 10, 2004, ruling, is to be kept confidential. There are also definitions in the Order, including what constitutes proprietary information and what is subject to the attorney-client privilege. The Order clarifies that the documents subject to the Order only concern what has been tendered by Peoples to the lawyers and is in the lawyers' individual files; the Order does not concern what is admitted, offered, or used at trial. (*i.e.,* for purposes of cross-examination.). (*See,* AG Petition for Interlocutory Review, Attachment B).

The Protective Order only concerns what is "published" to outside entities, which would not include expert witnesses, etc. And, it would only cause a few days' delay in publication to third-parties, as the whole process is designed to take no more than eight business days, when there is a dispute. (*Id.*).

The Protective Order provides that CUB, the AG, and the City must tender to Counsel for Peoples information for an initial evaluation as to whether the documents at issue are confidential. They do this by tendering, in writing, the bates-stamp number(s) of the documents and a brief description of the documents, to counsel for Peoples, and, Peoples has five business days to respond. A response consists of one of three options: a) informing counsel that the information is not confidential; b.) redacting confidential portions; or c) filing and serving a written motion setting forth facts establishing that there is a dispute and stating Peoples' legal position as to why a document should be under seal. (*See,* AG Petition for Interlocutory Review, Attachment B).

The parties are <u>not</u> required to state why they seek to publish information to outside parties, or, to whom they are publishing it. The Order specifies that this process can be effectuated by e-mail. If the parties cannot agree, then Peoples must bring the matter before an administrative law judge (an "ALJ") for a ruling, in the form of a written motion stating its position, within five business days from the date of request. At all times, Peoples has the burden of proving that material is privileged and cannot be published. (*Id.)*. Also,

[5] Peoples had already tendered this information to Commission Staff. (Peoples Response at 2).

Peoples has the burden of drafting a motion bringing a dispute before an ALJ. As Peoples points out, this procedure is not substantially different from the procedure in the Confidentiality Agreement, except that there are more stringent standards imposed on Peoples. (*See,* Peoples Response at 6, AG Petition for Interlocutory Review, Attachments A and B).

There is also a penalty for violating the Order, of $1,000, per violation.[6] In this way, the attorneys for Peoples are provided with an incentive to respond to a request within the time frame in the Order (as opposed to "dragging their feet.").[7] And, the other parties are provided with the incentive to use the procedure in the Order, instead of bypassing it, as they, too, are subject to the penalty provision.

The AG's Motion addresses the propriety of that Protective Order.

The Legal Standards

While the file in a court case is a public record, to which, the people and the press have a right of access, (*See, e.g., In re the Marriage of Johnson,* 232 Ill. App. 3d 1068, 1074, 598 N.E.2d 406 (4th Dist. 1992), *Skolnick v. Altheimer & Gray,* 191 Ill. 2d 214, 232-33, 730 N.E.2d 4 (2000), materials procured by attorneys in discovery are not public components of a trial. (*Bush v. Catholic Diocese of Peoria,* 2004 Ill. App. Lexis 823 *8 (3rd Dist. 2004)). The public's right of access to court records does not extend to confidential materials in the possession of counsel, which are not in the court file. (*Id.*, *International Truck and Engine Corp. v. Caterpillar, inc.,* 2004 Ill. App. Lexis 942 *8 (2nd Dist. 2004)). Orders that restrict public access to privileged or otherwise confidential material during the discovery process do not infringe on the right of access to public documents. (*Bush,* 2004 Ill. App. Lexis 823 at *8). Materials obtained by counsel in discovery are private, as those documents are in the files of the attorneys, not the court files. (*Statland v. Freemen,* 112 Ill. 2d 494, 499-500, 493 N.E.2d 1075 (1986)).

Pretrial procedures before administrative tribunals, like this one, are governed by the fundamental principles and requirements of due process of law. (*Krocka v. Chicago Police Board,* 377 Ill. App. 3d 36, 49, 762 N.E.2d 577 (1st Dist. 2001)). The Public Utilities Act (the "Act") and Commission Rules define when issuance of a protective order is appropriate. The Act provides that this Commission "shall provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity." (220 ILCS 5/4-404). Commission Rules further provide that:

> At any time during the pendency of a proceeding, the Commission or the Hearing Examiner may, on the motion of any person, enter an order to protect the confidential, proprietary or trade secret nature of any data, information or studies.

[6] Commission Staff is not required to follow the procedure set forth above and it is not subject to the penalty.

[7] The copy of the Order attached to the AG's Petition for Interlocutory Review was amended in an ALJ ruling *nunc pro tunc,* (retroactive to July 21, 2004) on August 6, 2004, to provide that the penalty is only per violation, not per violation, per day.

(83 Ill. Adm. Code 200.430(a)).

When a party seeks access to confidential documents in discovery, generally, a trier of fact can issue an order requiring parties to redact confidential information, or issue a protective order limiting public access to information tendered to opposing counsel. (*See, e.g., International Truck and Engine Corp.,* 2004 Il. App. Lexis 942 *14). Entry of an order restricting public access to records is improper when a party has demonstrated that substantial prejudice will result from entry of that order. (*Zielkes v. Wagner and Kettner Agency,* 291 Ill. App. 3d 1037, 1040, 684 N.E.2d 1095 (2nd Dist. 1997)).

It is not disputed that proprietary information, or information subject to the attorney-client privilege, falls within the purview of the statute and regulation cited above. And, the AG does not dispute that the discovery matter at issue concerns attorney-client material or proprietary material, which is privileged. (*See, Generally,* AG Petition for Interlocutory Review).

Peoples' Motion for Entry of a Protective Order alleged that electronic data search results contained attorney-client materials among the items tendered pursuant to discovery requests propounded on it. (*See,* Peoples' Motion for Entry of a Protective Order). No party disputed the veracity of that contention. Therefore, it is not disputed that privileged material is the subject of the Protective Order, which cannot be freely disseminated to third parties. (*Menoski v. Shih,* 242 Ill. App. 3d 117, 121-22, 612 N.E.2d 834 (2nd Dist. 1993)). Thus, the issue here is not whether documents must be kept confidential, it is what procedure to employ to keep those documents confidential.

Resolution of discovery disputes involves application of basic concerns, like efficient disclosure of relevant information, as well as fairness. (*See, e.g., Kunkel v. Watson,* 179 Ill.2d 519, 531, 689 N.E.2d 1047 (1997); Sup. Ct. Rule 201(k)). The Protective Order allows for complete and timely disclosure of Peoples' information to all of the other parties. It also allows for determination that a document is confidential on an "as needed" basis, should the AG or another party desire to publish a document in attorneys' file to an entity that is not a party to this proceeding, like a newspaper.

The Protective Order also applies the basic principle of fairness. The sheer volume of information requested, on a limited topic, was caused by some parties' lack of concise discovery questions with specific limitations. As the AG points out, it appears that these boxes contain a considerable amount of material that can best be described as "extraneous." (*See,* AG Petition for Interlocutory Review at 2). Notable is the fact that none of the parties have filed objections to the extraneous material as non-responsive to the discovery questions they posed to Peoples in discovery.

On February 10, 2004, the parties were advised to consider using discovery tools that would decrease the amount of useless information tendered in response to their discovery requests. Now that these parties have chosen not to propound discovery

requests in a manner that decreases the amount of extraneous information tendered to them, fairness requires that the onus to sift through that information, should the parties seek to release it to third-parties, should not fall on Counsel for Peoples. This is true because the onus on the other parties pursuant to the Protective Order, that is, to e-mail Counsel for Peoples with the bates-stamp numbers and a brief description of documents, prior to publication to third parties, is small.

Additionally, entry of the Protective Order is efficient, as it prevents delay. Because the discovery requests were so vague and unspecific, a considerable amount of time would be involved in sifting through all of the documents in question.

Finally, while some of the parties averred that entry of the Protective Order would cause harm to their trial strategies, none of the parties cited specific examples. Nor was one evident, as the Protective Order does not concern trial and it does not restrict a party's ability to request or receive materials. The Protective Order only concerns publication of materials received from Peoples to third parties.

The AG Arguments

The Confidentiality Agreement

The AG argues that the Protective Order "usurps" the Confidentiality Agreement. However, Counsel for Peoples stated that it would not apply the Confidentiality Agreement to the documents tendered pursuant to the February 10, 2004, ruling. (Tr. 385). And, while it does modify what the parties previously agreed to do, it only does so if a party wishes to publish documents received from Peoples to an entity that is not a party to this proceeding. (AG Petition for Interlocutory Review at 3, *See also* Attachment B). The Confidentiality Agreement, on the other hand, concerns what happens at trial, as well as prior to trial. (*Id.* at Attachment A). And, practically speaking, there is little difference between the procedure in the Protective Order and the Confidentiality Agreement. Therefore, the fact that the AG must now use the procedure in the Protective Order prior to publishing documents to third parties should make little difference to the AG.

The AG also contends, essentially, that the Confidentiality Agreement provides better protection than the Protective Order because it requires Counsel for Peoples to make a good faith determination that a document is confidential, while the Protective Order does not. (AG Petition for Interlocutory Review at 3). It is true that the Protective Order does not require Counsel for Peoples to make a good-faith determination that a document is confidential. However, the AG, and the other parties have copies of the documents in question. Counsel for both parties would be viewing those documents during the procedure set forth in the Protective Order.

If there were a dispute, Counsel for Peoples would be required, pursuant to the Protective Order, to state, in a written motion, the nature of that dispute, and the legal reasons for its position. If Counsel for Peoples were acting in bad faith, the Protective

Order requires Counsel serve this written motion on the ALJ within five business days of the request. Thus, the assertion of a position that was not made in "good faith" would be resolved quickly.

Also, the term "good faith," is vague. It would be difficult to find that Counsel did not act in "good faith" if there was any basis for his or her position. Therefore, the Confidentiality Agreement does not afford the AG more protection than the Protective Order.

The AG further maintains that the Protective Order unfairly shifts the burden of proof to designate material as confidential from Peoples to the AG. The AG argues that, if Peoples does not respond to a challenge, the disputed information will retain confidential designation, pending further action by the ALJ, and, potentially, the Commission. (AG Petition for Interlocutory Review at 4). But the Confidentiality Agreement also has a process, by which, the parties place any dispute before the ALJ, and then, get a ruling. There is little difference, in substance, between the two processes, except that the Protective Order fines Peoples, for failure to act in accordance with the time line in the Order, which is not the case in the procedure provided in the Confidentiality Agreement.

And, the assertion that the burden of proof has shifted to the AG is not correct. Peoples has the burden of proof at all times, pursuant to the Protective Order, to prove that information is proprietary or subject to the attorney-client privilege. (*See,* Tr. 256; AG Petition for Interlocutory Review, Attachment B).

The AG also avers that there is no requirement in the Protective Order that Peoples demonstrate that confidential treatment is sought due to disclosure of information that would be harmful to its competitive position. The Confidentiality Agreement, however, has no such requirement. (*See,* AG Petition for Interlocutory Review, Attachment A). And, if there were a dispute, Counsel for Peoples would be required to state the reasons for its position, in a motion, which would necessarily include a demonstration that information is harmful to a competitive position, if that were its position on the issue. Therefore, the Protective Order provides the AG and other parties with protection against false claims that information is proprietary

The AG further maintains that no protective order is necessary because the parties already entered into a Confidentiality Agreement. (AG Petition for Interlocutory Review at 8). It is undoubtedly true that there existed a confidentiality agreement prior to issuance of the Protective Order. This argument overlooks, however, the situation that the AG and other parties have created, that is, the existence of 43 boxes of documents and 135 DVDs/CDs, which were tendered pursuant to those parties' discovery requests. As Peoples notes, a sharp change occurred in the process since February 10, 2004. That change has produced "expansive" discovery. (*See,* Peoples Response at 5). Moreover, the parties have asked for a great deal of data from the computers of attorneys for Peoples. Information on an attorney's computer calls the attorney-client privilege into play. And, electronic information is easily disseminated.

Further, the Confidentiality Agreement would require Counsel for Peoples to cull through all of that material, and make a determination, now, as to what is privileged information. (*See, e.g.,* Tr. 256). The Confidentiality Agreement contemplated that Counsel for Peoples would determine, at the outset, whether a document was confidential, and, mark that document accordingly, before tendering it to opposing counsels. This no longer became practicable when the parties made so many broad requests, regarding a limited topic, and when they made requests for matters like attorney-client information, which cannot be disseminated to the public.

The parties already agreed to keep documents confidential; they entered into the Confidentiality Agreement. It should be a simple matter then, for them to abide by the Protective Order, which only concerns documents in the lawyers' files, and not what is used at trial.

Usurping the Public Nature of this Proceeding

The AG also maintains that the Protective Order undermines the public nature of the proceedings by creating a presumption of confidentiality, citing 220 ILCS 5/10-101. (AG Petition for Interlocutory Review at 3, 5). In fact, the proceeding here is trial, not what is tendered by counsel to counsel in discovery before trial. What is procured though use of discovery tools is not a public component of a trial. (*Bush v. Catholic Diocese of Peoria,* 2004 Ill. App. Lexis 823 *8 (3rd Dist. 2004)). Once materials are received in open court, then, they become public records. (*Krocha v. Chicago Police Board,* 327 Ill. App. 3d 36, 41, 762 N.E.2d 577 (1st Dist. 2001)). Therefore, an Order such as the one at issue here, which only concerns public access to documents tendered in discovery, and not at trial, has no impact on the public nature of the proceedings here. (*Bush,* 2004 Ill. App. Lexis 823 at *8; *Statland,* 112 Ill. 2d at 499-500).

Also, the Protective Order does not have a presumption of confidentiality. Rather, the procedure in that Order allows the lawyers to work out, amongst themselves, what should be kept confidential, with resolution by an ALJ, if the parties cannot reach agreement. In fact, this is how discovery usually proceeds, at this Commission, and in other tribunals. (See, e.g., Sup. Ct. Rule 201(k)).

The AG cites *Cass Long Distance Services, Petition for Emergency Relief to Protect its Annual Report,* 1999 Ill. PUC Lexis 206, in support of its argument that Counsel for Peoples should be required to determine, now, what is confidential, instead of doing it, if and when the need arises, pursuant to the Protective Order. However, *Cass* concerned the confidentiality of an Annual Report, which, like evidence presented at trial, is a public record. (*See,* 220 ILCS 5/5-109). The issue here concerns what is tendered by Counsel to Counsel, before trial, pursuant to discovery. The Protective Order specifically excludes documents used at trial from the procedure set forth above. *Cass* does not apply here.

Also, pursuant to the Confidentiality Agreement, what is subject to the attorney-client privilege and what is proprietary would be filed under seal, irrespective of the Protective Order. The AG has not disputed that there are documents here that must be kept confidential. Therefore, the Protective Order has no impact on the "public nature" of these proceedings.

The AG further contends that the Protective Order does not require an evidentiary showing before information is designated as confidential. (AG Petition for Interlocutory Review at 6). An evidentiary showing is one done before an administrative tribunal or a judge. The Confidentiality Agreement contained no such requirement, and, nothing of the kind took place previously. (*See, Id.* at Attachment A). Therefore, this argument does not aid the AG.

Also, an evidentiary showing that material is confidential may be necessary at trial, when the documents become part of the record in this proceeding. But the AG cites no law that requires the free dissemination of documents to third parties that are in the files of the attorneys, and are not part of the record. In fact, the law is clear on this topic, parties involved in litigation do *not* have a right to disclose confidential information to non-parties. (*See, e.g., Bush v. Catholic Diocese of Peoria,* 2004 Ill. App. Lexis 823 at *8 (3rd Dist. 2004)). And, what the AG argues here is that there must be an evidentiary showing on the part of Peoples' Counsel, regarding every document tendered to opposing counsels, even though, undoubtedly, few of these documents will be made part of the record, or used otherwise at trial. This type of procedure is time-consuming and unwarranted. It also would deviate, significantly, from the procedures used before this tribunal and others, like the federal and circuit courts, without any benefit. (*See, e.g., International Truck and Engine Corp*. v. *Caterpillar, Inc.,* 2004 Ill. App. Lexis 942 at*2-5 (2nd Dist. 2004)).

Interjection of Personal Sentiment

The AG further maintains that entry of the Protective Order was done to interject a personal view as to how information should be kept confidential. The AG argues that the ALJ "acted on (her) own" to provide additional protection to Peoples. (AG Petition for Interlocutory Review at 9-11). In making this argument, the AG has taken comments made at the July 21, 2004, hearing out of context. The comments cited were made after rulings had been made, when Counsel continued to argue, despite the fact that a ruling had been made and Counsel had already been heard on the subject. (*See,* Tr. 219-232, addressing arguments made by the parties, Tr. 234-35, where the AG arguments were made, and Tr. 239). It is not uncommon for an ALJ to have to, on occasion, remind attorneys, somewhat abruptly, that a ruling has already been made, and therefore, the parties must move on to other issues. And it is in that context that those comments were made, after arguments were heard, rulings were made, and Counsel, nevertheless, continued to argue. (*Id.*).

The AG avers that Peoples never explained why the existing protective agreement could not provide it with adequate protection. (AG Petition for Interlocutory Review at 9). The AG neglects to mention that Peoples filed a written motion seeking issuance of

Protective Order, and, the parties briefed the issue. In that Motion, Peoples averred that, in order to comply with discovery propounded on it, Peoples was required to disseminate a large amount of electronic data. Peoples represented that this electronic data, which is easily disseminated, contained proprietary information and material that is subject to the attorney-client privilege. (Peoples' Motion for Entry of a Protective Order). Also, lengthy discussions were had during status hearings, in which, Counsel for Peoples stated that it would take months to cull through all of the documents requested and determine which documents were subject to the attorney-client privilege or contained proprietary information, and, therefore, needed to be segregated. (*See, e.g.,* Tr. 256).

The decision to enter the Protective Order, and decisions regarding what should be included in that Order, were made after careful consideration of the argument of counsel on the issues, and after independent legal research on the part of the ALJ. (*See, e.g.,* Tr. 219-255, discussing the issues raised in the briefs and issuing individual decisions on those issues.). A party that prevailed on an issue did so due to merits of that party's legal position, not a desire to "provide additional protection to Peoples."

The AG argues, in essence, that two points it made at the July 21, 2004, status hearing were ignored. A brief review of the transcripts of that hearing reveals what occurred. After rulings were made regarding whether a protective order would issue and what would be in that order, the AG argued, essentially, that there should not be a penalty provision in the Protective Order; instead, the AG argued that the Confidential Agreement's provisions should suffice, which allowed Peoples to pursue its legal and equitable remedies. Also, the AG represented that Peoples was free to renegotiate the terms of the Confidentiality Agreement. (*See,* AG Petition for Interlocutory Review at 9-10; Tr. 234-45).

When Counsel made those arguments, however, arguments had already been heard and the ruling had been made that there would be a penalty, and stating why there would be a penalty, that is, to provide the parties with sufficient incentive to comply with the Protective Order. (Tr. 224). The AG's contentions were nevertheless addressed. The AG was advised that the Protective Order contained a penalty for violating it because including a provision like the one in the Confidential Agreement allowing Peoples to pursue its legal and equitable remedies after the Order had been violated would be virtually meaningless, as it would be difficult to establish the damage that had been done. (Tr. 233-34). (*See also Agrimerica v. Mathers,* 199 Ill. App. 3d 435, 444-449, 557 N.E.2d 357 (1st Dist. 1990), discussing damages in a case involving enforcement of a restrictive covenant.). Counsel continued to argue, however, and it was at that point in time that the remarks cited by the AG were made, to move the topic of conversation over to one that had not already been discussed and re-discussed. (Tr. 238-40). Also, renegotiation of the terms of the Agreement is obviously not a viable option, as negotiations on the issue had already reached an impasse at the time Peoples filed a motion seeking entry of a protective order.

The AG argues that the penalty provision was "unilaterally thrust" on it. (AG Petition for Interlocutory Review at 10). The original draft order Peoples proposed had a penalty provision. (*See,* Motion for Issuance of a Protective Order, Attachments). That penalty provision was modified so that *any* violation of the Protective Order, including one on the

part of Peoples, would be penalized. As the attorneys were previously advised, a penalty for violation of the Order remained in the Order because the penalties suggested by the AG, CUB and the City (that Peoples can sue for breach of contract, or seek specific performance) would only go into effect *after* the Order was violated, and, after the damage was done. The parties were also advised that it would be difficult to enforce such a provision, making the Protective Order virtually meaningless. (*See, e.g.,* Tr. 238). The penalty provision was not something that that was "unilaterally concocted." Rather, it was placed in the final Protective Order, after the parties brief the issue, and in contemplation of the arguments presented, to ensure that all of the parties abide by the Order.

The AG further contends that the penalty provision and the process (what the AG calls "the confidentiality challenge process") for determining what is confidential were "thrust upon the parties." (AG Petition for Interlocutory Review at 10). The parties, however, had a process in the Confidentiality Agreement, through which, a party such as the AG could challenge Peoples' designation of a document as confidential, with the ALJ as the ultimate arbiter of that dispute, if need be. The Protective Order has a similar procedure, only it requires Peoples to act within a relatively short period of time, or be subject to the penalty provision. And, according to the AG, the parties had engaged in discussions amongst themselves for entry of a protective order, prior to its entry. (Tr. 237). Nothing was "thrust" upon the parties.

The AG avers that no reason whatsoever was provided to justify "discarding" the Confidentiality Agreement that "neither party challenged." (AG Petition for Interlocutory Review at 10). The AG omits from mention, however, that after negotiations broke down amongst the parties regarding a protective agreement or protective order regarding the recently-tendered discovery, Counsel for Peoples filed a written Motion for Entry of a Protective Order, with an attached draft protective order. (*See, e.g.,* Tr. 237, regarding the AG discussions of previous discussions on the subject of protective orders; Peoples Motion for Entry of a Protective Order,). Peoples, therefore, challenged the effectiveness of the Confidentiality Agreement with regard to the discovery produced after the February 10, 2004 ruling. And, as was mentioned earlier, Staff advised Counsel for Peoples to seek a protective order. It is not correct to state that neither party challenged application of the Confidentiality Agreement to the discovery at issue.

Also, the phrase "no reason whatsoever" overlooks the great lengths of time spent entertaining and discussing the parties' positions on the issue. (*See, e.g.,* Tr. 226, 330, 325-26, discussing the onus placed on counsel for Peoples by not entering a protective order; 220-21, discussing terms in the Order.). This argument further overlooks the fact that the parties were asked to address issuance of a Protective Order in briefs, and, a many changes to that Order were effectuated, pursuant to the parties' positions, in the final version of that Order. (*See,* Tr. 218-267).

Without the Protective Order, discovery would have come to a "grinding halt" for two or three months, while confidential documents were segregated and marked

accordingly. And, none of the parties offered any solution to this situation, except Counsel for Peoples, when moving for entry for a protective order.

The AG further argues that it will be harmed by using the process in the Protective Order, as it has made many decisions with regard to discovery pursuant to the Confidentiality Agreement. (AG Petition for Interlocutory Review at 10-11). However, the Protective Order has no impact on what documents the AG receives during discovery; it only has a possible impact, a few days delay, in publication of non-confidential documents to third parties. And, the parties always agreed not to disclose confidential information. The AG cites no example of how it will be harmed, and, none is evident, since the Protective Order has no effect on what is tendered by Counsel for Peoples to it.

Proprietary Information

The AG maintains that the definition of "proprietary" in the Protective Order is vague. (*Id.* at 11). The AG did not raise this concern in its Brief regarding entry of a Protective Order. (*See,* AG Opposition to Entry of a Protective Order). And, the Confidentiality Agreement contains no definition of what is proprietary. Finally, the AG does not state how this definition is vague.

Also, according to the AG, the word "harm" in the definition of "propriety" could include information leading to adverse regulatory decisions. (*Id.* at 12). This argument overlooks the language of the Protective Order, which provides that proprietary information is information that, "if revealed in a competitive setting would cause harm." (*See, Id.* at 11). Therefore, the "harm" here would be revealing something in competitive setting, not leading to the discovery of illegal activities. Nor would any ruling in this Commission regarding the Protective Order (or, at any other time) ever be done to protect anyone from his or her illegal conduct. This argument, too, has no merit.

The AG additionally argues that the standard in the Protective Order is subjective, quoting something stated a status hearing, which was, that most lawyers know proprietary information when they see it. (Tr. at 227). According to the AG, the threshold determination as to what is proprietary should be made pursuant to objective standards, not on the basis of a "know it when you see it" standard. (AG Petition for Interlocutory Review at 13).

However, the AG fails to mention that resolution of any differences between the parties would be made by applying objective standards, pursuant to a written motion, and ruled upon, by an ALJ applying those standards. What the Protective Order requires, and indeed, the Confidentiality Agreement requires, is a determination as to what is privileged by an ALJ, if the lawyers for the parties cannot make a determination on this issue themselves. There is nothing unusual about allowing the attorneys to make the assessments as to what is proprietary, with the trier of fact, the ALJ, to make a determination when the lawyers are unable to reach agreement. Indicia that this type of arrangement is not a rare occurrence can be found in the fact that the Confidentiality Agreement has the same type of process in it.

Moreover, there is nothing subjective about reminding counsel that most matters can be resolved between lawyers. Lawyers are trained to know the law and to apply the law. Especially with regard to discovery disputes, lawyers are frequently asked to make every attempt to resolve matters between themselves before bringing a dispute before a trier of fact. (*See, e.g.,* S. Ct. Rule 201(k) requiring facts establishing personal consultation, among lawyers, and reasonable attempts to resolve differences, in all motions to compel discovery.). The AG sets forth no fact or law establishing that the definition of "proprietary" in the Protective Order should be changed, or that this definition unfairly burdens it.

Penalties

Peoples' original draft order had a $1,000 fine for disseminating information that was subject to the Protective Order. (*See,* Peoples' Motion for Entry of a Protective Order, Attachments). In the briefs, the parties argued that Peoples had an adequate remedy in the Confidentiality Agreement, which is, to seek remedies for breach of contract, or to seek equitable remedies, like specific performance, after the breach, the dissemination of the information protected, has occurred. No party suggested another remedy for dissemination of confidential information. (*See, e.g.,* AG Opposition to Entry of a Protective Order.).

The final Protective Order had a penalty provision that would penalize the intervening parties in the amount of $1,000 per dissemination for publishing privileged information to third parties, in violation of the order, but, it also penalized Peoples in the same amount for failure to act in accord with the short time line provided in the Order. (*See,* AG Petition for Interlocutory Review, Attachment B). A penalty was included to ensure that Peoples complied with its obligations in the Order. The penalty was also was included to ensure that the intervening parties did not violate the Protective Order. (*See, e.g.,* Tr. 224, 234). The parties were advised that the remedies they posed occur after the fact, when the damage has already been done. And, it is difficult to measure what that damage would be. (*Id.*). These two factors render a Protective Order enforcing the contractual remedies in the Confidentiality Agreement virtually meaningless. (*Agrimerica v. Mathers,* 199 Ill. App. 3d 435, 444-449, 557 N.E.2d 357 (1st Dist. 1990)).

The AG disputes the imposition of a penalty against it, citing examples given, when the ruling was made, in which, the legislature has empowered this Commission to penalize parties for violating orders. The list of examples cited, was raised in response to arguments raised in briefs regarding issuance of a Protective Order; it was not an exhaustive one. (AG Petition for Interlocutory Review at 14-15; Tr. 225).

Essentially, the AG argues that it is not required to obey Commission orders; only utilities must obey Commission orders. (AG Petition for Interlocutory Review at 14-15). The AG points out that it is not a utility or a corporation, and argues that, therefore, it is not subject to Section 5-202 of the Public Utilities Act. Also, the AG argues that it is not an agent, officer, or employee of a utility, and is not subject to Section 5-203 of the Act.

However, Section 5-203 of the Act also includes "individuals." (220 ILCS 5-203). The AG does not explain how this provision does not apply to individual persons who violate the Order.

And, the existence of 220 ILCS 5/5-202 and 5-203 evidence the General Assembly's intention to empower this Commission to impose penalties on those who violate Commission orders. Statutes must be interpreted in a manner that gives effect to the intent of the General Assembly. Accordingly, the rules of statutory construction require application of a statute in a manner that addresses the General Assembly's objective when enacting the statute. (*See, e.g., Hall v. Henn,* 208 Ill. 2d 325, 330, 802 N.E.2d 797 (2003)). Here, the General Assembly empowered this Commission to punish those who do not obey its Orders. Construing the statutes in the manner in which the AG suggests would require that only utilities, and not other parties, would be subject to those orders. This is not what the General Assembly intended when enacting Sections 5-202 and 5-203 of the Act. (220 ILCS 5/5-202 and 5-203).

Other statutes come into play here, too. Since the parties have represented, in this proceeding, that they will not disseminate privileged information, Section 202.1 of the Act could apply, if improper dissemination to third parties occurred. (220 ILCS 5/5-202.1). This statute provides a minimum $1,000 fine for making misrepresentations in Commission proceedings. And it applies to "any person or corporation" committing such an offense. (*Id*.). If any of the intervening parties disseminate information in clear violation of the Protective Order, this Commission would be authorized, pursuant to Section 5-202.1 of the Act, to fine the individual who violated the Order. (*Id.*).

Also, the Act and the rules of practice require ALJs to provide adequate protection for confidential and proprietary information. (220 ILCS 5/4-404; 83 Ill Adm. Code 200. 430). Inherent in providing "adequate protection" is delivering consequences for failure to adhere to an order on the issue. (*Sander v. Dow Chemical Co.,* 166 Ill. 2d 48, 65-66, 651 N.E.2d 1071 (1995); *Joliet Sand and Gravel Co. v. Ill. Pollution Control Board,* 163 Ill. App. 3d 830, 835-36, 516 N.E.2d 955 (1987), upholding the decision of a hearing officer at the Board, pursuant to pertinent regulations, to issue a protective order that severely limited discovery.). And, the only alternative penalties proposed by the AG, are that Peoples should be entitled to prove legal or equitable remedies, which would occur, after the harm has already taken place, is not "adequate protection" for confidential and proprietary information.

In reality, the AG is a constitutional officer, who represents the interests of the People of the State of Illinois in this proceeding. Assistant attorneys general are officers of the court. The penalty in the Protective Order only applies to what is disseminated in violation of the Order, that is that which is wrongfully disseminated to third parties. Undoubtedly, someone in such a position would only put the penalty to the test in the most extraordinary of circumstances. Therefore, the penalty, for the AG, should not really be an issue.

And, pursuant to the Confidentiality Agreement, a judge or an ALJ could require the AG to pay consequential damages for breach of the Agreement. There is little difference, in substance, between paying a penalty or paying damages for breach of contract, except that the time of the payment would differ, and, undoubtedly, the consequential damages for breach of contract, if established, would be greater than $1,000 per violation.

Finally, the AG avers that the damages provision in the Confidentiality Agreement should suffice. (AG Petition for Interlocutory Review at 14-15). As stated earlier, the damages provision in the Confidentiality Agreement only applies after the Agreement has been breached, when the harm has already occurred. And, the Protective Order arose, not through a desire to re-negotiate the terms of the Confidentiality Agreement, but, as a means, through which, the parties could fluidly receive discovery responses in a timely fashion, to discovery requests that could have been, but, were not, succinct.

Under normal circumstances, the Confidentiality Agreement would not be an issue. The circumstances in this docket, however, do not fall within the definition of normal circumstances. Many parties have propounded overwhelming discovery requests. And, parties have chosen to make requests of documents that are highly private, *i.e.,* word searches of attorneys' computers. The situation here leads to a mix of a great deal of "extraneous" matter with matter that cannot be revealed to third parties. Also, as a review of the transcripts cited herein reveals, this docket is highly contentious. Asking the parties to resolve this issue, amongst themselves, therefore, (*i.e.,* consider modifying preexisting agreements) is not really a viable or feasible option.

Avoiding Situations Like the One Here in the Future

I would like to urge the Commission to consider adding to our rules of practice regarding discovery. (83 Ill. Adm. Code 200.335 through 430). The Supreme Court Rules, which govern practice in the circuit courts, contain sample discovery requests for certain types of cases, which are useful guides for drafting precise questions. Those Rules also have useful definitions, like defining what is within the scope of discovery, and what is subject to the attorney-client privilege. Definitions help clarify what is discoverable. (*See, e.g.,* Sup. Ct. Rules 201, 213). If our Rules provided the same type of guidance, discovery disputes could be minimized, the parties could know, with greater clarity, what they can and cannot do, and cases would move through discovery more quickly, without the "bottleneck" that appears to be occurring here. I would therefore recommend initiating a rulemaking or like procedure revising our rules of discovery to provide more guidance and instruction on discovery and discovery-related matters. (83 Ill. Adm. Code 200.335 through 430).

Accordingly, I recommend that the Commission deny the relief the AG requested in its Petition for Interlocutory Review.

CS:fs